DA 09-0500

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

LON PETERSON,

Plaintiff/Appellant and Cross-Appellee,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Defendant/Appellee and Cross-Appellant.

* *

PLAINTIFF/APPELLANT PETERSON'S OPENING BRIEF

* *

On Appeal from the District Court of the Eighth Judicial District
Hon. Julie Macek

* *

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutory Authority

Page(s)

Federal Rules of Civil Procedure

Montana Code Annotated

Montana Rules of Appellate Procedure:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does 50%-50% negligence under Montana's comparative negligence statute, § 27-1-702, MCA, constitute "reasonably clear" liability, as a matter of law, under § 33-18-201(6), MCA?

2. Does an offer of judgment, acceptance and entry of judgment against the insured constitute an admission of the insured's liability and, therefore, "reasonably clear" liability, as a matter of law, under § 33-18-201(6), MCA?

3. Did the District Court err in allowing St. Paul to rely on prejudicial and inadmissible evidence in justifying its refusal to effectuate a prompt, fair, and equitable settlement in violation of § 33-18-201(6), MCA?

4. Did the District Court err in refusing to instruct the jury, pursuant to § 61-8-303(3), MCA, that St. Paul's insured was required to operate the insured vehicle at a reasonable and prudent speed under the circumstances?

5. Does the attorney hired by the insurer to conduct the post-filing defense of the insured in a third-party tort claim, act as the insurer's agent in perpetuating the insurer's pre-filing violations of the continuing duties under § 33-18-201 and § 33-18-242, MCA?

STATEMENT OF THE CASE

On June 15, 2004, Plaintiff and Appellant, Lon Peterson, sustained severe and permanently disabling injuries in a head-on motor vehicle accident involving a vehicle insured by Defendant and Appellee, St. Paul Fire & Marine

Insurance Company. During the ensuing three years, St. Paul denied any and all liability and refused to make any attempt to settle Peterson's claim until May 31, 2007, when St. Paul finally made an Offer of Judgment for $850,000, which Peterson accepted. (Pl's Exhs 37a, 37b; TR Vol 2, 278-79)[1]. On June 12, 2007, the Federal District Court in Great Falls entered an $850,000 judgment against St. Paul's insured and Satisfaction of Judgment was filed July 11, 2007. (Pl's Exhs 37c, 37d; TR Vol 2, 279).

On June 19, 2007, Peterson filed this third-party "bad faith" insurance claim, alleging that St. Paul's denial of any and all liability and its absolute refusal to make any attempt to settle Peterson's claim for three years was belied by the facts and its unconditional Offer of Judgment and constituted a violation of §33-18-201(6), MCA, for which a cause of action is provided under §33-18-242, MCA. (CR 1, 2).[2] Peterson's Complaint also alleged a failure to properly investigate the claim, in violation of §33-18-201(4), MCA. (*Id*.).

Peterson obtained St. Paul's claims file in discovery, including status reports and evaluations from attorney Bill Gregoire, who was hired by St. Paul to defend its insured, Omimex Canada Ltd., and Omimex's employee, Michael Lindberg, who was operating the insured vehicle. St. Paul's file revealed that on July 1, 2004, a few weeks after the June 15, 2004, accident, St. Paul

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[1] "TR Vol" refers to the applicable transcript volume followed by the relevant transcript page(s).

[2] "CR" refers to the District Court Clerk's Case Register Report followed by the applicable document number.

determined negligence to be equally divided 50%-50% between Lindberg and Peterson. (Pl's Exh 40; TR Vol 2, 302-04).

Gregoire's only assessment of percentages of negligence likewise concluded that a jury would, at best, assign 50% negligence to each party and, at worst, assign 70% negligence to Lindberg. (Pl's Exh 35; TR Vol 2, 312-13). Gregoire also advised St. Paul that, contrary to St. Paul's denial of any and all liability, a jury would not assign 51% or more negligence to Peterson. (Pl's Exh 65; TR Vol 2, 314-16).

On September 30, 2008, Peterson filed a motion for preliminary legal ruling, arguing that since an insured's 50% negligence constitutes liability, as a matter of law, under Montana's comparative negligence statute, §27-1-702, MCA, such 50% negligence must also constitute an insured's "reasonably clear" liability, as a matter of law, under §33-18-201(6), MCA. (CR 48). After a hearing on February 17, 2009, the District Court denied Peterson's motion, ruling that the "purely legal" issue of the definition of reasonably clear liability under §33-18-201(6), MCA, should be decided by the jury. (CR 98; TR 2/17/09 Hearing, 15-17).

Later, in ruling on pretrial motions *in limine*, the District Court went even further and prohibited Peterson from "instructing the jury that a finding of 50/50 negligence amounts to negligence as a matter of law." (CR 98, p. 10). During trial, Peterson was precluded from even mentioning that 50/50 negligence constitutes negligence, as a matter of law, even though Montana's

comparative negligence statute, §27-1-702, MCA, provides exactly that. (TR Vol 3, 496-510). The District Court also refused to instruct the jury that an insured's 50% negligence constitutes liability, as a matter of law, under the comparative negligence statute or reasonably clear liability under Montana's Unfair Trade Practices Act (UTPA). (Pl's Instrs 11, 53; TR Vol 5, 945-46; 953-54).

On October 18, 2007, St. Paul filed a pretrial motion for summary judgment arguing that Lindberg's liability was never "reasonably clear," as a matter of law, because such liability was always "contested" and "disputed." (CR 10). Peterson argued that by making an unconditional Offer of Judgment, St. Paul admitted Lindberg's liability, making liability reasonably clear, as a matter of law. (CR 18). After a hearing on February 12, 2008, the District Court denied St. Paul's motion, but also ruled that St. Paul's Offer of Judgment and resulting adverse judgment were not admissions of reasonably clear liability in the underlying case. (CR 39; TR 2/12/08 Hearing, 18). At trial, the District Court also refused Peterson's instruction on that issue. (Pl's Instr 57; TR Vol 5, 954-55).

Prior to trial, Peterson sought an order *in limine* prohibiting St. Paul from relying on prejudicial and inadmissible evidence to justify its denial of all liability and its refusal to promptly and fairly settle Peterson's claim. (CR 58-59). Specifically, evidence that neither driver received a traffic citation for the accident; that the Highway Patrol could determine a "point of impact"; and that

Peterson "habitually" drove in the center of the road was ruled inadmissible by Federal District Judge Haddon in the underlying case and, pursuant to *Britton v. Farmers Insurance Group*, 721 P.2d 303 (Mont. 1986), St. Paul was precluded from relying on such inadmissible evidence in denying Peterson's claim. (*Id*.) The District Court denied Peterson's motion *in limine* and St. Paul inundated the jury with such inadmissible and prejudicial evidence as justification for its denial of liability and refusal to settle. (CR 98, p. 7, ¶ g; TR Vol 2, 410-11; TR Vol 3, 588-89).

Peterson also filed a pretrial motion *in limine* arguing that attorney Gregoire acted as St. Paul's agent, making St. Paul vicariously responsible for Gregoire's post-filing conduct which perpetuated St. Paul's pre-filing denial of all liability and refusal to make any attempt to settle. (CR 58-59). The District Court denied Peterson's motion and refused to give any jury instructions on that issue, thereby allowing St. Paul the quintessential "empty chair" defense regarding Gregoire's post-filing conduct. (CR 98; Pl's Instr 37; TR Vol 5, 950-51).

A jury trial was conducted August 17-21, 2009. Because the District Court allowed inadmissible and prejudicial evidence that Lindberg did not receive a traffic citation for "speeding," and that, therefore, his liability for the accident could not have been "reasonably clear," Peterson requested a jury instruction that, nevertheless, Lindberg was still required to operate the insured vehicle at a reasonable and prudent speed under the circumstances. (Pl's Instr

62; TR Vol 5, 944; 959-60). The District Court refused to so instruct the jury. (TR Vol 5, 959-60). The jury returned an 8-4 defense verdict, finding that liability was not "reasonably clear" and, therefore, St. Paul did not violate either subsections (4) or (6) of §33-18-201, MCA. (TR Vol 5, 1046). Judgment was entered August 31, 2009, and Notice of Entry of Judgment was filed September 2, 2009. (CR 141, 142). Peterson filed a timely Notice of Appeal with this Court on September 4, 2009.

The verdict and judgment in favor of St. Paul should be reversed and a new trial granted to Peterson. The District Court's legal and evidentiary errors prevented the jury from concluding that Lindberg's liability was at all times "reasonably clear" and that by refusing to make any attempt to settle for three years, St. Paul violated its continuing obligations under the UTPA.

STATEMENT OF RELEVANT FACTS

A. The Accident.

The head-on collision involving Peterson and Lindberg occurred on a blind hill on a narrow dirt road north of Cut Bank, Montana, on June 15, 2004. (Pl's Exh 29; TR Vol 2, 257-58). Lindberg admitted he approached the blind hill at 40-55 mph and never slowed down at all before impact. (TR Vol 2, 440-41). Lindberg also admitted to two separate law enforcement officers at the scene that, at the instant of impact, he took his eyes off the road and was distracted by his ringing cell phone. (TR Vol 2, 285-92).

Highway Patrol Officer Danny Sons' accident report stated:

> The drivers of both vehicles crested the top of a blind hill on their respective sides at the same time. The driver of V1 [Lindberg] glanced down at his cell phone that started ringing at the same instance.

(Pl's Exh 1; TR Vol 2, 287-90). Sons also testified that Lindberg admitted at the scene to being distracted by the ringing cell phone. (TR Vol 2, 302). Sons' accident report listed Lindberg's "cell phone use" as a "contributing factor" in the cause of the accident. (Pl's Exh 1; TR Vol 2, 288-89). At the scene, Lindberg also admitted to Glacier County Sheriff Deputy, Jeff Fauque, that as he crested the top of the blind hill, his cell phone range, he reached for the phone and the impact occurred. (Pl's Exh 3; TR Vol 295).

On November 4, 2003, a few months prior to the accident, Lindberg signed and agreed to abide by his employer's cell phone policy, which St. Paul required and which provided, "keep your hands on the wheel and your eyes and mind on the road while driving" and "using a cell phone while driving leads to an increased risk of having an accident through a lack of attention to driving. Inattention is the #1 cause of vehicle accidents in America." (Pl's Exh 88; TR Vol 2, 298-302) (emphasis added).

There was no posted speed limit on the rural country road and, by default, the speed limit was 70 mph, subject to the "reasonable and prudent" standard set forth in §61-8-303(3), MCA. The blind hill prevented either vehicle from detecting the other's approach until an instant before impact.[3]

[3] It had rained that day so there was no dust cloud to indicate the presence of an approaching vehicle. (Def's Exh 508; TR Vol 2, 458; 465).

Whereas Lindberg was traveling at 40-55 mph, Peterson was going 10-15 mph. (Pl's Exh 29; TR Vol 2, 257-58). Lindberg's excessive speed substantially reduced the time needed to avoid a collision. (Pl's Exh 35; TR Vol 2, 312-13).

There were no lines painted on the 18-foot-wide dirt road and, therefore, there was no clear centerline and no clearly defined edge of the road from which a centerline could be measured. (Pl's Exh 29; TR Vol 2, 259; 290-91). There were three traveled tire paths, with the center path being shared by the left tires of vehicles proceeding in opposite directions. (TR Vol 2, 290-91). The left front corners of the two vehicles collided at the crest of the blind hill. Officer Sons' report concluded that "both vehicles crested the top of [the] blind hill on their respective sides at the same time." (Pl's Exh 1; TR Vol 2, 288-90).

St. Paul initially concluded that it was "disputed who may of [sic] been over center point of road or whether both were." (Pl's Exh 40; TR Vol 2, 302-04). Lindberg admitted he did not even know where the imaginary centerline was. (TR Vol 2, 343-44; TR Vol 4, 838-39). St. Paul hired Bozeman physicist, Denny Lee, to determine if either driver was over the imaginary centerline at the point of impact. (TR Vol 2, 329-30).

Lee came up with four different scenarios. He first concluded that Lindberg was on the correct side of the road; then Lindberg was 20 inches on the wrong side of the road; then Peterson was 24 inches on the wrong side of the road; then Peterson was 21 inches over the imaginary centerline. (TR Vol 2, 337-38). Peterson's expert, Dr. Berg, opined that Lindberg was 1.5 feet over

the imaginary centerline. (Pl's Exh 35; TR Vol 2, 312-13). St. Paul never disclosed to Peterson that Lee had determined it was Lindberg who was 20 inches on the wrong side of the road. (TR Vol 2, 360).

The facts of the accident, therefore, established and St. Paul concluded, that, at best, both Lindberg and Peterson would be found 50% negligent and, at worst, Lindberg would be found 70% negligent because he was inattentive, took his eyes off the road to respond to the ringing cell phone, was traveling too fast for the circumstances of the narrow road and blind hill, and may have been over the imaginary centerline. (TR Vol 2, 340).

Peterson sustained severe and permanently disabling injuries, including a fractured left hip, deranged left knee, and broken ribs. (TR Vol 2, 259; TR Vol 3, 717). There was no dispute that Peterson will require at least one, possibly two, hip replacements and one, possibly two, knee replacements. (TR Vol 2, 326-27). Within months after the accident, Peterson's medical bills exceeded $68,000. (TR Vol 3, 722-23).

B. <u>St. Paul's Pre-Filing Conduct</u>.

Peterson's claim was first assigned to Claim Representative, Richard Allums, in Helena, Montana, on June 21, 2004. (TR Vol 2, 420). Allums concluded there was coverage and that the policy limits were $1,000,000. (TR Vol 2, 426-27). Under the insuring agreement of St. Paul's policy, Allums knew Lindberg had to be found "legally liable" for the accident before St. Paul

was legally "responsible" or "required" to pay damages. (Pl's Exh 91; TR Vol 2, 270-72; 427-28).

Because Peterson's claim was a negligence claim, Allums knew there was no legal requirement to pay under the policy unless Lindberg breached the applicable standard of care and was 50% or more negligent. (TR Vol 2, 272-74; 428-30). It was undisputed that St. Paul would not have offered an $850,000 judgment without first determining that Lindberg was at least 50% negligent and, therefore, "legally required" to pay Peterson's damages under the St. Paul policy. (TR Vol 2, 281-83; Vol 4, 780).

Allums obtained the Highway Patrol Report, spoke to Sons, spoke to Peterson's insurance company and took recorded statements of both Peterson and Lindberg. Allums determined that Lindberg admitted at the scene that he was distracted by the cell phone and that Sons determined "cell phone use" to be a contributing factor. (TR Vol 2, 293-94; 301-02; 431). Allums, however, never spoke with Deputy Fauque about Lindberg's admission that he was reaching for the phone at the time of impact. (TR Vol 2, 431-34).

Based on his investigation, Allums submitted a "liability evaluation" to St. Paul on July 1, 2004, stating:

> . . . both drivers owed duty to operate motor vehicles in accordance with Mt statute. breach of care by both drivers apparent for inattention. disputed who may of been [sic] over center point of road or whether both were.
>
> * * *
>
> . . . obtain decision on accident reconstruction toward final liability analysis. otherwise, i would

> recommend a position of 50-50 liability whereby each party is entitled to half of their damages.

(Pl's Exh 40; TR Vol 2, 302-04)(emphasis added). Allums' reference to "inattention" could not have been attributable to anything other than Lindberg's cell phone use and his excessive speed. (TR Vol 2, 304).

In response to Allums' liability evaluation, his supervisor, Tom Frazier, advised that Lindberg's cell phone use was the "biggest" liability question and that any reconstruction to determine who may have been over the imaginary centerline would "not assist" with the cell phone issue. (Pl's Exh 41; TR Vol 2, 348-50). Despite Frazier's warning that any reconstruction would not obviate Lindberg's breach of the standard of care due to his inattentive use of the cell phone, Allums hired Denny Lee who arrived at his four various centerline scenarios. (TR Vol 2, 337-39).

It is undisputed that the facts of Lindberg's negligent inattention due to his cell phone use and his excessive speed did not change at all from Allums' July 1, 2004, 50/50 evaluation until St. Paul's Offer of Judgment in May 2007. (TR Vol 2, 268; 305-07). St. Paul's Senior Technical Specialist, Dale Reed, admitted that the liability facts never changed from the accident until May 2007. (TR Vol 3, 669-70). Despite St. Paul's admission that Lindberg's inattention would produce a 50/50 liability split and that those facts never changed, St. Paul denied any and all liability for the accident. (TR Vol 2, 359-61).

On July 12, 2004, Peterson's attorney, Robert Pfennigs, wrote St. Paul that it was critical to pay Peterson's medical bills because he had no health insurance coverage. (Pl's Exh 5; TR Vol 2, 352-53). By that time, St. Paul already knew that Lindberg was negligent for breaching the standard of care by being distracted and inattentive, that the negligence was 50/50 and that any accident reconstruction by Denny Lee was not going to "assist" with the cell phone issue. (TR Vol 2, 353). On September 13, 2004, Pfennigs informed St. Paul that the financial pressure on Peterson from the unpaid medical bills was becoming "intolerable." (Pl's Exh 11; TR Vol 2, 356-57)(Pl's Exh 74a-rr; TR Vol 3, 623-26).

Instead of acknowledging Lindberg's 50% share of the negligence, which made Lindberg's liability for 50% of Peterson's damages reasonably clear, as a matter of law, under Montana's comparative negligence statute, St. Paul denied any and all liability based solely on Denny Lee's dubious centerline conclusion, which St. Paul admitted did not obviate the issue of Lindberg's cell phone inattention. (Pl's Exh 22; TR Vol 2, 359-60). St. Paul then told Peterson's healthcare providers to bill Peterson "directly" for the escalating medical bills. (Pl's Exh 14; TR Vol 2, 361-62). Faced with St. Paul's absurd position that Lindberg was 0% negligent, even though it secretly admitted 50% negligence, Peterson was forced to file a lawsuit in Great Falls Federal District Court on June 29, 2005. (Pl's Exh 20; TR Vol 2, 260-61).

C. St. Paul's Post-Filing Conduct.

Upon service of the lawsuit, St. Paul's insured, Omimex Canada Ltd., specifically requested that Attorney Steve Lehman of the Crowley Firm in Billings be assigned to defend the case. (Pl's Exh 21; TR Vol 2, 261-63). St. Paul refused and told Omimex it had the right to choose defense counsel. (Pl's Exh 56; TR Vol 2, 263-64). St. Paul then hired attorney Gregoire and instructed him to "not take any actions in connection with the handling of this lawsuit unless you have our specific authorization." (Pl's Exh 19; TR Vol 2, 265-67). St. Paul also paid all of Gregoire's expenses and fees. (TR Vol 2, 267).

Gregoire's August 19, 2005, "Initial Evaluation and Budget" advised St. Paul, as Allums advised previously, that "we may be facing a possible 50-50 liability apportionment." (Pl's Exh 29; TR Vol 2, 257). On December 1, 2006, Gregoire reported to St. Paul that:

> Given the facts of this case and the conflicting expert testimony concerning causation, we believe the jury will, at best, assign 50% negligence to each party, thereby allowing Plaintiff to recover that percentage of his damages. At worst, liability may be split 70%-30%.

(Pl's Exh 35; TR Vol 2, 312-14)(emphasis added). Thereafter, Gregoire continued to advise that the best result St. Paul could expect from the jury was a 50/50 negligence split. (Pl's Exh 65; TR Vol 2, 314-17).

In fact, Gregoire told St. Paul that a jury would not assign 51% or more negligence to Peterson, meaning that Peterson could not lose and, thus, St. Paul

would be liable for at least 50% of Peterson's damages. (Pl's Exh 65; TR Vol 2, 314-16). Gregoire advised St. Paul it was "probable" the jury would allow Peterson to recover at least 50-70% of his damages, and that the best result was a 50/50 negligence split. (TR Vol 2, 316-17). Paradoxically, Greogire was simultaneously permitted to testify that Lindberg's 50-70% negligence was not reasonably clear liability. (TR Vol 4, 905-07).

Despite Gregoire's insistence that the jury would award Peterson 50-70% of his damages and that Peterson would not be found more than 50% negligent and lose the case, St. Paul continued to deny any and all liability. (TR Vol 3, 662-63). Even though Lindberg's negligence was always evaluated at 50% or greater, St. Paul still denied that liability was "reasonably clear." (TR Vol 4, 868-69). Gregoire, however, never told St. Paul that Lindberg's negligence was zero. (TR Vol 4, 918-19). Based on Gregoire's evaluations, St. Paul informed its insured there was the chance of an excess judgment, which would never happen if the insured's negligence was zero, or even less than 50%. (Pl's Exh 63; TR Vol 2, 309-10). Even Lindberg testified in the underlying case that he thought liability was evenly split at 50/50. (TR Vol 2, 343-44).

Yet, St. Paul continued to contend Lindberg's negligence was absolutely zero, he was not negligent at all, and that even at 50-70%, Lindberg's liability was never "reasonably clear." (TR Vol 2, 343; TR Vol 3, 662-63). Whereas Gregoire admitted that Lindberg was at best 50% and at worst 70% negligent,

Dale Reed testified that, "no one from St. Paul ever found any negligence on the part of Mr. Lindberg." (TR Vol 3, 662). Reed testified that all of Peterson's allegations of negligence against Lindberg were "inappropriate" and there was "no evidence" that Lindberg was inattentive by looking down at the ringing cell phone. (TR Vol 3, 663-65). Reed even testified that St. Paul made the $850,000 offer of judgment under the assumption that Lindberg was 0% negligent. (TR Vol 3, 662-63; 668).

All of Gregoire's liability evaluations were always expressed in percentages of negligence. Yet the District Court's refusal to rule that 50/50 negligence constitutes liability, as a matter of law, and the District Court's ruling that Gregoire was not St. Paul's agent, allowed St. Paul to simultaneously disavow Gregoire's admissions that Lindberg's liability had to be "reasonably clear" under the comparative negligence statute while attributing the post-filing denial of all liability only to Gregoire.

Almost three years to the day after the June 15, 2004, accident, St. Paul made the $850,000 Offer of Judgment, which is the antithesis of a denial of any and all liability. At trial, the District Court refused to instruct the jury on the legal effect of the Offer of Judgment; refused to instruct the jury that 50/50 negligence constitutes reasonably clear liability or even liability, as a matter of law; refused to give any instructions on St. Paul's agency relationship with Gregoire; refused to instruct the jury on reasonable and prudent speed; and improperly allowed inadmissible and prejudicial evidence to justify St. Paul's

denial of all liability. The jury returned a defense verdict and this appeal timely followed.

SUMMARY OF ARGUMENT

This case squarely presents the question of what constitutes an insured's "reasonably clear liability" under Montana's UTPA. Liability or negligence does not have to be "certain" or 100% to be reasonably clear. *Ridley v. Guarantee National Ins. Co.*, 951 P.2d 987 (Mont. 1997). Because 50% negligence or anything greater is liability, as a matter of law, under Montana's comparative negligence statute, §27-1-702, MCA, then an insured's 50% negligence or anything greater must, by definition and, as a matter of law, be reasonably clear liability under the UTPA.

The District Court's refusal to so rule or instruct the jury allowed St. Paul to deny that Lindberg's admitted 50-70% negligence was reasonably clear liability, even though it was liability, as a matter of law. The District Court permitted St. Paul to deny the undeniable and Peterson was prevented from receiving a fair trial.

The District Court's other errors aided and abetted St. Paul's undeniable denial. The jury was not told that St. Paul admitted Lindberg's reasonably clear liability by agreeing to the entry of a judgment which determined liability adversely to St. Paul. The District Court allowed St. Paul to rely on prejudicial and inadmissible evidence as justification for denying Lindberg's liability, contrary to *Britton v. Farmers Ins. Group*, 721 P.2d 303 (Mont. 1986). The

District Court compounded its error by refusing jury instructions which would have provided the jury a basis for concluding that Lindberg's liability was reasonably clear.

Finally, the District Court refused to give the jury any instructions at all that St. Paul was in any way responsible or accountable for attorney Gregoire's post-filing liability evaluations or perpetuation of St. Paul's pre-filing denial of reasonably clear liability. St. Paul was, therefore, simultaneously permitted to disavow Gregoire's post-filing admissions of negligence and also create an "empty chair" defense by relying on Gregoire's contradictory denial of reasonably clear liability.

ARGUMENT

I. 50/50 NEGLIGENCE UNDER §27-1-702, MCA, MUST CONSTITUTE "REASONABLY CLEAR" LIABILITY, AS A MATTER OF LAW, UNDER §33-18-201(6), MCA.

A. Standard of Review.

In deciding the purely legal question of what constitutes "reasonably clear" liability under Montana's UTPA, §33-18-201(6), MCA, the Court must apply the *de novo* or plenary standard of review. The District Court's conclusions of law are reviewed *de novo* to determine whether they are correct. *Shults v. Liberty Cove, Inc.*, 146 P.3d 710, 711-12, ¶ 9 (Mont. 2006).

B. Definition of Reasonably Clear Liability.

Montana's UTPA, §33-18-201, *et seq.,* was first enacted in 1977 and provides that:

> **Unfair claims settlement practices prohibited.** No person may, with such frequency as to indicate a general business practice, do any of the following:
>
> * * *
>
> (6) Neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
>
> * * *
>
> (13) Fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(Emphasis added). The phrase "reasonably clear liability" is not defined by the Act.

In *Klaudt v. Flink*, 658 P.2d 1065 (Mont. 1983), the Court considered an issue of first impression and interpreted §33-18-201(6), MCA, as conferring, upon third-party claimants, a private cause of action against an insurer for failure of the duty to settle. The Court did not, however, attempt to define "reasonably clear liability," which is the threshold determination which triggers the obligation to attempt prompt, fair and equitable settlements. *Id*. at 1067-68.

In 1987, the Legislature enacted §33-18-242, MCA, which codified the third-party cause of action recognized in *Klaudt*. *See*, *e.g., O'Fallon v. Farmers Insurance Exchange*, 859 P.2d 1008 (Mont. 1993). Again, however, no definition of "reasonably clear liability" was provided by the Legislature. In subsequent cases, the question of reasonably clear liability has been addressed, but never specifically defined.

In *Hart-Anderson v. Hauck*, 748 P.2d 937 (Mont. 1988), the insurer made a pretrial offer of 50% of the claimant's property damage due to alleged contributory negligence in a rear-end collision. The claimant offered to accept 90%. At the "bad faith" trial, however, expert testimony seemed to suggest that 100% "liability" was required to constitute "reasonably clear liability." *Id.* at 943. On appeal, this Court did not specifically decide whether 100% negligence, or 50% negligence, or some percentage in between would satisfy the "reasonably clear liability" threshold.

In *Ridley v. Guarantee National Insurance Co.*, 951 P.2d 987 (Mont. 1997), the insurer acknowledged its insured was 90% negligent for a motor vehicle collision. The claimant's attorney explained that because the insured "was more than 50% at fault," liability was reasonably clear and the insurer was liable to pay claimant's medical expenses in advance of settlement. *Id.* at 988-89. In its answer to claimant's declaratory judgment action for pre-payment of medical expenses, the insurer also admitted the insured "had the majority of fault." *Id.* at 989 (emphasis added). The insurer never admitted 100% liability.

In considering the issue of whether §33-18-201, MCA, requires an insurer to advance-pay medical expenses "when the liability of its insured is reasonably clear," this Court held that both subsections (6) and (13) of §33-18-201, MCA, impose such an obligation. *Id*. at 992 (emphasis added). More significantly, instead of remanding for a factual determination of reasonably

clear liability, the Court remanded for "entry of a declaratory judgment consistent with this opinion." *Id*. at 995.[4]

In the absence of any statutory definition of "reasonably clear liability" under §33-18-201 or §33-18-242, MCA, therefore, it is clear under *Ridley* that an insured's liability, negligence or fault, does not have to be 100% to be "reasonably clear." Otherwise, the insured's 90% "fault" would not have been sufficient for the Court to order entry of a declaratory judgment mandating pre-payment of medical expenses.

The question remains what "level" of liability constitutes "reasonably clear" liability. Because 100% negligence is not required, and 50% or more negligence constitutes liability, as a matter of law, under Montana's comparative negligence statute, §27-1-702, MCA, then reasonably clear liability must, by definition, mean 50% negligence or anything greater.

C. 50/50 Negligence Must Constitute Reasonably Clear Liability, as a Matter of Law.

It is undisputed that a defendant who is 50% or more negligent is liable to the plaintiff, as a matter of law, under §27-1-702, MCA. In *Marry v. Missoula County*, 866 P.2d 1129 (Mont. 1993), the District Court, sitting as the trier of fact, found that "the collision was caused equally by [plaintiff's] failure to yield the right-of-way and by [defendant] who exceeded the speed limit." *Id*.

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[4] *See also, DuBray v. Farmers Insurance Exchange*, 36 P.3d 897 (Mont. 2001), where the insurer was required to advance-pay lost wages even though the insured was only "primarily liable." *Id.* at 898, ¶ 4.

at 1130 (emphasis added). Negligence was, therefore, equally split 50/50. Inexplicably, however, the Court entered a conclusion of law stating:

> The negligence of [plaintiff] and the negligence of [defendant] . . . contributed equally to the accident barring recovery to either party.

Id. (emphasis added). The Court entered judgment for defendant.

On appeal, plaintiff contended that because negligence was equally split 50/50, the clear mandate of §27-1-702, MCA, entitled her to recover 50% of the damages, as a matter of law. This Court agreed and directed the District Court to enter judgment in plaintiff's favor for half the damages. *See also*, *Andrews v. United States*, 447 F.Supp. 434 (D.C. Mont. 1978) (50% negligence of plaintiff entitled plaintiff to 50% of damages).

It should not require any great leap in logic to conclude that liability, as a matter of law, must, of necessity and by definition, also constitute "reasonably clear liability." If 50/50 negligence constitutes liability, as a matter of law, under §27-1-702, MCA, as held in *Marry*, it must also constitute reasonably clear liability, as matter of law, under §33-18-201(6) and (13), MCA.

To conclude otherwise would create a dangerous legal inconsistency and considerable chaos and turmoil in the manner in which insurance claims are handled under Montana's UTPA. It is undisputed that in a motor vehicle negligence case such as this, the determination of the insured's liability (which determination is required under the UTPA) is most often characterized or expressed in percentages of negligence.

St. Paul's retained "bad faith insurance" expert, Gordon Phil, admitted there is no other way to characterize a liability determination in a motor vehicle accident case other than in percentages of negligence. (TR Vol 4, 779). Attorney Gregoire and Peterson's retained attorney expert, Rick Anderson, both testified there have to be specific acts of negligence to support any percentages of negligence. (TR Vol 2, 274-78; TR Vol 4, 913-14; 916).

Under these circumstances, if an insurer is allowed to deny the existence of "reasonably clear liability" in a 50/50 negligence case and require some unknown "level" of liability greater than 50/50, each insurance company will be able to determine its own "sliding scale" definition of reasonably clear liability and ignore the clear legal mandate of §27-1-702, MCA.

In this case, Richard Allums testified in his deposition, which was made part of the trial record, that he would never find 50/50 negligence as "reasonably clear liability" but "perhaps" 74%, but not 70%. (TR Vol 3, 670-71; depo. pp. 54-56)(CR 129.100). By Denying Peterson's Motion for Preliminary Legal Ruling, the District Court improperly allowed Attorney Gregoire to testify to the purely legal opinion that even though a jury would not find Peterson more than 50% contributorily negligent, liability was still not reasonably clear. (TR Vol 4, 905-06). St. Paul was also allowed to cross-examine Rick Anderson that no percentage of negligence, 50/50, 60/40 or 70/30 has been defined by the Montana Supreme Court as reasonably clear liability. (TR Vol 2, 389-90).

D. The District Court Erred in Refusing to Legally Define Reasonably Clear Liability.

Since the UTPA does not define "reasonably clear liability," the only possible source of a logical definition is §27-1-702, MCA. Prior to trial, Peterson requested a "Preliminary Legal Ruling" that 50% or more negligence constitutes reasonably clear liability, as a matter of law, under §33-18-201(6), MCA. (CR 48). Peterson did not ask the Court to find that reasonably clear liability existed, as a matter of law, in this case. (*Id*., p. 2). Peterson only requested a purely legal decision that the definition of reasonably clear liability under the UTPA must necessarily equate to 50% or more negligence under the comparative negligence statute, §27-1-702, MCA. (CR 48, pp. 2-3).

The District Court's refusal to legally define reasonably clear liability, either in a preliminary legal ruling or in jury instructions, greatly prejudiced Peterson's right to a fair trial. The jury was instructed that Peterson had the burden of proving Lindberg's reasonably clear liability (Ct's Instr 5; TR Vol 5, 981-82), yet he was precluded from even arguing the legal effect of 50/50 negligence under applicable Montana law. (TR Vol 3, 496-510). Whereas St. Paul was allowed to simply deny that 50/50 negligence or even 70/30 negligence was reasonably clear liability, Peterson was unfairly prohibited from satisfying his burden of proof with the only logical definition of reasonably clear liability there could be.

Despite Gregoire's admissions that a jury would find Lindberg 50-70% negligent and that Peterson would not be found 51% negligent, the District

Court's refusal to define reasonably clear liability as 50/50 negligence under §27-1-702, MCA, allowed St. Paul to, at the same time, completely deny reasonably clear liability by attributing Gregoire's negligence assessments to "subjective" findings, "intangible" factors, "extraneous" issues, and amorphous "exposure" analysis.

Gregoire was repeatedly allowed to testify that 50/50 or 70/30 negligence against Lindberg was not reasonably clear liability because the only reason St. Paul paid an $850,000 judgment was not because Lindberg was 50-70% liable or negligent, but because Peterson was a local farmer, he made a good witness, he had sympathetic injuries, and Omimex was a foreign corporation. (TR Vol 4, 849-50; 864-65; 867-68; 886-87). Reed was also allowed to deny all liability based on "factors" other than negligence. (TR Vol 3, 701-02). St. Paul was, therefore, allowed to manufacture a "reasonable basis" defense even though Lindberg's negligence was admitted, as a matter of law. A correct legal ruling and jury instructions by the District Court would have resulted in a jury verdict based on the undisputedly applicable law in negligence cases, not admittedly "extraneous" factors which have little to do with the required liability determination under the UTPA.

Moreover, the jury instructions that were given (Ct's Instr 12; TR Vol 5, 983), forced Peterson to merely argue that 50/50 negligence constituted liability, as a matter of law, and, therefore, reasonably clear liability. (TR Vol 5, 994-96). However, the jury was repeatedly instructed that statements of the

attorneys are not evidence and that the applicable law comes from the Court and nowhere else. (TR Vol 2, 251-52; TR Vol 5, 978-79; Ct's Instr 2; TR Vol 5, 980-81). Peterson's arguments were futile in the absence of a proper statement of the law from the Court. *See, Hallberg v. Brasher*, 679 F.2d 751, 757, n. 7 (8th Cir. 1982); *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131, 138 (5th Cir. 1964).

II. ST. PAUL'S OFFER OF JUDGMENT CONSTITUTED AN ADMISSION OF "REASONABLY CLEAR" LIABILITY, AS A MATTER OF LAW.

A. Standard of Review.

The District Court's conclusion of law that St. Paul's offer of judgment, Peterson's acceptance, and the United States District Court's entry of judgment, did not constitute an admission of "reasonably clear liability," as a matter of law, is reviewed *de novo* to determine if it was correct. *Shults v. Liberty Cove, Inc.*, 146 P.3d 710, 711-12, ¶ 9 (Mont. 2006).

B. St. Paul Admitted Reasonably Clear Liability.

The Federal Court's judgment against St. Paul (Pl's Exh 37c; TR Vol 2, 279), was like any other judgment entered by a federal court because it conclusively and unconditionally resolved all issues of Lindberg's liability adversely to St. Paul. A Rule 68, F.R.Civ.P., judgment has the estoppel effect of precluding any ancillary action covered by the judgment. *Fafel v. Dipaola*, 399 F.3d 403, 414-15 (1st Cir. 2005). Relief from a Rule 68 judgment must be pursued under Rule 60, F.R.Civ.P., the same as any other judgment.

Richardson v. Amtrak, 49 F.3d 760, 765 (D.C. Cir. 1995); *Webb v. James*, 147 F.3d 627, 622 (7th Cir. 1998).

In *David v. A.M. International*, 131 F.R.D. 86 (D.C. Penn. 1990), the Court held that the Plaintiff, who had accepted Defendant's Rule 68 offer of judgment, was the prevailing party, had obtained "substantial relief" on all major claims and was, therefore, entitled to costs and fees because "an offer of judgment is an admission of liability." *Id*. at 89, (emphasis added). *See also, Singleton v. Cable-Dahmer Chevrolet, Inc.*, 1997 WL 527277, *2 (D.C. Mo. 1997).

In *Perkins v. U.S. West,* 138 F.3d 336 (8th Cir. 1998), a Defendant who offered judgment and then "won" dismissal of the entire case on summary judgment two days later, was still bound by the judgment entered pursuant to Plaintiff's acceptance within the required ten days. A judgment entered under Rule 68 is, therefore, not "extinguished" by an intervening entry of a contrary summary judgment on the merits. *See also, Hernandez v. United Supermarkets,* 882 P.2d 84 (Okla. 1994); *Centric-Jones Company v. Hufnagel*, 848 P.2d 942 (Colo. 1993).

Under Montana law, the acceptance of a Rule 68 offer of judgment precludes any subsequent challenge to liability already determined by the judgment. In *Weston v. Kuntz*, 635 P.2d 269 (Mont. 1981), the Court held that Plaintiff's acceptance of Defendant's offer of judgment made Defendant's appeal of the liability issue "inappropriate" because the entry of judgment made

the question of liability "moot." *Id.* at 273. *See also, Cruz v. Pacific American Ins. Corp.,* 337 F.2d 746, 750 (9th Cir. 1964) (there could never be a valid offer of judgment and acceptance if there had to be a subsequent determination of liability).

Finally, in *Roberts v. Empire Fire & Marine Ins. Co.*, 923 P.2d 550 (Mont. 1996), Justice Nelson (with Justices Trieweiler and Leaphart) wrote a concurring opinion suggesting that because of the insurer's admission of liability resulting from the claimant's acceptance of an "unconditional" offer of judgment, the insurer could not have "possibly" defended the claimant's bad faith claim under the UTPA by alleging that liability was not "reasonably clear." *Id.* at 556.

An offer of judgment can be made "conditional" with a stipulation that it does not admit liability and that it has no effect except to settle a disputed case. *See, Mite v. Falstaff Brewing Corp.*, 106 F.R.D. 434, 435 (D.C. Ill. 1985). Because St. Paul unconditionally offered judgment, it constitutes an admission and judgment of liability which cannot be collaterally attacked or disavowed.

The District Court erred in ruling that St. Paul's Offer of Judgment and the Federal Court's subsequent Entry of Judgment did not constitute an admission of reasonably clear liability. The District Court erred in refusing Peterson's Instruction 57 on that subject. (TR Vol 5, 954-55). Because the jury determined that Lindberg's liability was not "reasonably clear", the District Court's error greatly prejudiced Peterson's right to a fair trial. Without

a court ruling or jury instructions regarding the legal effect of the adverse judgment entered against its insured, St. Paul was improperly and prejudicially permitted to deny reasonably clear liability when such liability was undeniable.

III. THE DISTRICT COURT ERRED BY ALLOWING ST. PAUL TO RELY ON PREJUDICIAL AND INADMISSIBLE EVIDENCE.

A. Standard of Review.

The District Court's decision allowing St. Paul to rely on prejudicial and inadmissible evidence in justifying its denial of all liability and its refusal to effectuate a prompt, fair and equitable settlement in violation of §33-18-201(6), MCA, is reviewed for abuse of discretion. *Britton v. Farmers Ins. Group*, 721 P.2d 303, 315 (Mont. 1986).

B. Inadmissible and Prejudicial Evidence.

In the underlying case, Federal District Judge Haddon granted Peterson's First Motion *In Limine* excluding, as inadmissible and prejudicial, (1) any evidence of the lack of traffic citations; (2) any expert testimony by Highway Patrol Officer Sons and any testimony by Sons "as to the point of impact of the accident"; and, (3) any testimony as to "Lon Peterson's prior driving activity." (CR 58, 59 with Judge Haddon's attached order). The District Court's decision to allow St. Paul to rely on such inadmissible and prejudicial evidence to justify its denial of any and all liability by Lindberg was directly contrary to this Court's decision in *Britton v. Farmers Ins. Group,* 721 P.2d 303 (Mont. 1986), and deprived Peterson of a fair trial.

In *Britton,* the insurer (FIG) accused the insured (Britton) of arson and refused coverage for a fire loss. Britton alleged the denial was in "bad faith" and the jury awarded him compensatory and punitive damages. On appeal, FIG alleged that the District Court erred in granting motions *in limine* excluding (1) evidence of Britton's failed polygraph examinations and (2) evidence of three other "questionable" fire insurance recoveries by Britton. FIG argued that because it was being sued for "bad faith," the excluded evidence was admissible to prove its denial was made in "good faith." *Id.* at 315.

This Court first held that the excluded evidence was inadmissible and, therefore, the District Court did not abuse its discretion in excluding it. *Id.* at 315. Secondly, and more importantly, the Court held that FIG was not entitled to rely on inadmissible evidence in deciding to deny the claim and that reliance on such inadmissible evidence is "not within the bounds of the duty of good faith." *Id.* at 315-16 (emphasis added). Likewise, St. Paul's reliance on inadmissible and prejudicial evidence in this case was not in good faith and the District Court abused its discretion by allowing such reliance.

C. St. Paul's Prejudicial Reliance.

As in *Britton*, the evidence relied on by St. Paul in this case was ruled prejudicial and inadmissible and excluded from evidence by the presiding judge. Unlike in *Britton*, however, the District Court in this case ruled that St. Paul was entitled to rely on such inadmissible evidence in justifying its decision to deny all liability, let alone "reasonably clear liability," for three

years. The District Court's decision is directly contrary to *Britton* and cannot be reconciled in any way.

The District Court's reliance on *Graf v. Continental Western Ins. Co.*, 89 P.3d 22 (Mont. 2004), that irrelevant and inadmissible evidence in the underlying negligence action may be relevant and admissible in a bad faith action is mistaken. (*See,* CR 98, p. 6). Judge Haddon excluded the evidence precisely because it was not admissible as to any issue of liability under Montana law. Yet St. Paul was allowed to rely on that very same inadmissible evidence as justification to deny the reasonably clear liability of its insured. (TR Vol 1, 209; 212; TR Vol 5, 956-57). Whether Lindberg's liability was "reasonably clear" was the key issue at trial. The District Court's erroneous ruling allowed attorney Gregoire and others to testify that Lindberg's liability was not reasonably clear precisely because of the evidentiary matters excluded by Judge Haddon.

Gregoire testified that it was a "huge" finding that Sons thought Peterson was at fault and it was "huge" that "the [highway patrol] officer determined that the point of impact was about two feet into Mr. Lindberg's lane." (TR Vol 4, 849-50; 861-62). St. Paul also elicited testimony that the lack of traffic citations was a "significant factor" in determining fault for the accident, (TR Vol 3, 588-89) and that the lack of citations meant "pretty strongly" that Lindberg was not at fault. (TR Vol 2, 455-56). Finally, the Court admitted, over objection, St. Paul's Exhibit 569, which referred to Peterson's "prior

driving activity," which Judge Haddon had specifically excluded. (TR Vol 4, 865-66).

The jury determined, based on the inadmissible and prejudicial liability evidence allowed into evidence by the District Court, that Lindberg's liability for the accident was not "reasonably clear." Under *Britton*, St. Paul was not entitled to rely on that inadmissible evidence to deny liability. The District Court's ruling to the contrary prevented Peterson from receiving a fair trial.

IV. THE DISTRICT COURT ERRED BY REFUSING PETERSON'S REASONABLE AND PRUDENT SPEED INSTRUCTION.

A. Standard of Review.

Whether the District Court formulated instructions which, as a whole, fully and fairly instructed the jury on the applicable law is reviewed for abuse of discretion. *Olson v. Shumaker Trucking & Excavating Contractors Inc.,* 196 P.3d 1265, 1270, ¶ 22 (Mont. 2008).

B. A Reasonable and Prudent Speed Instruction Was Necessary.

Whether Lindberg's liability was "reasonably clear" was the key issue at trial. St. Paul's denial of any liability was based, in large part, on inadmissible and prejudicial evidence that the Highway Patrol failed to issue any traffic citations to either driver.[5] Contrary to *Britton, supra*, the District Court allowed St. Paul to rely on such inadmissible and prejudicial evidence to

[5] Judge Haddon relied on *Smith v. Rorvik*, 751 P.2d 1053, 1056 (Mont. 1988) and *Hart-Anderson v. Hauck*, 781 P.2d 1116 (Mont. 1989), as authority for excluding evidence of the lack of any traffic citations.

convince the jury that without the issuance of any citations by the investigating officer, Lindberg could not have been negligent or liable. Specifically, St. Paul relied on the lack of any speeding citation to argue that, therefore, Lindberg's 45-55 mph speed over the blind hill could not have been excessive or unsafe.

Peterson sought to ameliorate the unfairly harsh impact of the District Court's ruling by requesting a jury instruction that, even in the absence of any traffic citation for violation of a posted speed limit, Lindberg was still required to drive at a reasonable and prudent speed under the circumstances, as required by §61-8-303(3), MCA. Peterson's Instruction 62 stated:

> Subject to any maximum speed limits, a person shall operate a vehicle in a careful and prudent manner and at a reduced speed no greater than is reasonable and prudent under the circumstances existing at the point of operation, taking into account the amount and character of traffic, visibility, weather and roadway conditions.

The District Court refused the instruction. (TR Vol 5, 944; 959-60). The District Court also refused Peterson's Instruction 59 that the lack of citations did not necessarily mean Lindberg was not negligent:

> In considering any evidence that no traffic citations were issued to either Mr. Peterson or Mr. Lindberg as a result of the underlying automobile accident, you are instructed that the lack of any traffic citations does not equate to the lack of civil negligence. A traffic violation involves a criminal proceeding requiring proof beyond a reasonable doubt.
>
> You are also instructed that any evidence of the lack of traffic citations would not have been admissible to the jury in the underlying case.

(TR Vol 5, 956-57).

C. The District Court's Refusal was Error.

The District Court committed prejudicial error when, contrary to *Britton, supra*, it allowed St. Paul to rely on the prejudicial and inadmissible evidence of the lack of traffic citations to justify its denial of Lindberg's liability and its refusal to make any attempt to settle Peterson's claim for three years. (TR Vol 5, 957). The Court compounded its error by then refusing Peterson's explanatory instructions which would have eased, if not eliminated, the prejudice.

The District Court abused its discretion in refusing Peterson's Instructions 59 and 62 because it "acted arbitrarily without the employment of conscientious judgment" or "exceeded the bounds of reason, in view of all the circumstances, ignoring recognized principles, resulting in substantial injustice." *Schuff v. Jackson*, 179 P.3d 1169, 1173, ¶ 15 (Mont. 2008). Coupled with the Court's violation of *Britton*, its arbitrary refusal to give Peterson's ameliorating instructions resulted in severe prejudice, which denied Peterson a fair trial.

V. GREGOIRE ACTED AS ST. PAUL'S AGENT IN PERPETUATING ITS UTPA VIOLATIONS.

A. Standard of Review.

The District Court's conclusion of law that attorney Gregoire did not act as St. Paul's agent is reviewed *de novo* to determine if it was correct. *Shults v. Liberty Cove, Inc.*, 146 P.3d 710, 711-12, ¶ 9 (Mont. 2006).

B. UTPA Duties are Continuing.

An insurer's duties under the UTPA are continuing and do not end upon commencement of a lawsuit. *Federated Mutual Ins. Co. v. Anderson*, 991 P.2d 915, 921-22, ¶ 23 (Mont. 1999). Because lawsuits necessarily involve attorneys hired to defend the insured, the insurer's "continuing duty" of good faith can be breached by the actions of such attorneys acting as the insurer's agents. *Id. Citing*, *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895 (Mont. 1993); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217 (Mont. 1986).

In this case, the insured, Omimex, requested that an attorney other than Mr. Gregoire defend Peterson's lawsuit. St. Paul refused and insisted that Gregoire be hired as "panel counsel" and that he "not take any actions in connection with the handling of this lawsuit unless you have our specific authorization." (Pl's Exh 19; TR Vol 2, 265-67).

Since St. Paul's duties under the UTPA continued even after commencement of the lawsuit and since Gregoire's "handling" of the lawsuit was specifically authorized by St. Paul, Gregoire's admissions that Lindberg was 50-70% negligent must have been attributable to St. Paul, as a matter of law. Otherwise, St. Paul's UTPA duties would not be "continuing", but, once the lawsuit was filed, could be illegally delegated and shifted to a non-party "empty chair" attorney.

Prior to trial, therefore, Peterson requested a ruling that Gregoire acted as St. Paul's agent. (CR 58-59). In turn, St. Paul made a motion that, as a matter

of law, Gregoire was not St. Paul's agent. (CR 56; 57). The District Court granted St. Paul's motion (CR 98), which allowed it to simultaneously disavow Gregoire's admissions that Lindberg would be found 50-70% negligent by a jury, yet point to Gregoire's "independent" assertions that, nevertheless, Lindberg's liability was not "reasonably clear."

This utterly confusing dichotomy required that the District Court give the jury instructions on St. Paul's relationship with Gregoire and that St. Paul was vicariously responsible and accountable for Gregoire's admissions that Lindberg's liability was reasonably clear. The District Court refused, however, to give any jury instructions on this issue at all and Peterson was prevented from receiving a fair trial.

C. St. Paul Shifted its UTPA Duties to Gregoire.

The only way St. Paul could avoid liability under § 33-18-201(6), MCA, for its complete failure to make any attempt to settle Peterson's claim for three years, was to convince the jury that Lindberg's liability was never "reasonably clear." The District Court assisted St. Paul in doing so by erroneously refusing to rule that 50%-50% negligence constitutes reasonably clear liability, as a matter of law. But St. Paul was also improperly allowed to shift its responsibility for determining "reasonably clear" liability and paying Peterson's claim to attorney Gregoire, who was not named as a party defendant.

Throughout the trial, St. Paul was repeatedly allowed to claim that it was Gregoire, with over 30 years of trial experience, who told St. Paul to deny

settlement because liability was never reasonably clear. At the outset, St. Paul, with the District Court's approval, made certain the jury understood that Gregoire was an "independent" advisor, unencumbered by any direction or control from St. Paul. (TR Vol 2, 385-87). The jury was told that once the lawsuit was filed, St. Paul completely relied on Gregoire for any liability evaluations. (TR Vol 1, 219). Over objection, the District Court allowed Dale Reed to testify that, "I cannot direct Mr. Gregoire on what to do." (TR Vol 3, 674-75; 680-81).

After establishing Gregoire's alleged "independence," St. Paul was then allowed to emphasize to the jury that it was Gregoire's decision, not St. Paul's, to deny liability and refuse to pay the claim and that St. Paul had the right to rely on Gregoire and not "second-guess" his informed opinions. (TR Vol 1, 219; 220-21). St. Paul was, therefore, allowed to use Gregoire as an excuse for violating its own duties under the UTPA.

D. Gregoire Was St. Paul's Agent.

In *O'Fallon v. Farmers Ins. Exchange,* 859 P.2d 1008 (Mont. 1993), the Court held that an individual insurance claims adjuster is subject to liability for violation of the UTPA because the definition of "person" under § 33-1-202(3), MCA, broadly includes "an individual . . . partnership . . . or any other legal entity." *Id.* at 1014. There is nothing in the UTPA, therefore, to prevent an individual attorney, such as Mr. Gregoire, or his "partnership," from being

subjected to liability for violation of the duties ascribed to any "person" under the UTPA.

If the "empty chair" approach taken by the District Court in this case is accepted, then every case hereinafter brought under the UTPA will necessarily include the "independent" lawyer or law firm hired by the insurance company to defend the insured. Such a result would create a legal fiction and produce absurd consequences. The defense attorney does not have the "power of the purse" necessary for ultimate payment of the claim in a prompt, fair and equitable manner as required by the UTPA. (TR Vol 3, 708).

Thus, rather than functioning as an independent responsible party under the UTPA, the defense attorney must, as a matter of law, be considered the authorized agent of the insurer who is solely responsible for ultimately paying the claim. It is patently unfair and contrary to the intent and purpose of the UTPA to allow an insurance company to escape liability by shifting responsibility to an unnamed third party attorney.

The case of *In Re Rules*, 2 P.3d 806 (Mont. 2000), cannot be interpreted as creating a safe haven for insurance companies to escape responsibility under the UTPA. *See*, *Schuff v. Jackson*, 179 P.3d 1169, 1177, ¶ 35 (Mont. 2008) (sanctions against insurer imposed without running afoul of attorney-client obligations set forth in *In Re Rules*). Regardless of what billing rules or practices are or are not imposed by insurers, the information and advice provided to insurers by defense attorneys during the course of a lawsuit

constitutes an integral part of the liability evaluation which insurers are required to perform under the UTPA. If an insurer is allowed to totally abdicate that responsibility to an unnamed third-party attorney as the District Court allowed St. Paul to do in this case, the insurer's duties will not be "continuing" beyond the filing date of any lawsuit and the purpose of the UTPA will be destroyed.

E. District Court's Failure to Instruct the Jury.

It is the duty of the trial judge to instruct the jurors fully and correctly on all applicable laws of the case and that duty cannot be "delegated" to counsel. *Billings Leasing Co. v. Payne*, 577 P.2d 386, 391 (Mont. 1978); *Schuff v. Jackson*, 55 P.3d 387, 395, ¶ 38 (Mont. 2002). The trial court commits reversible error by refusing to instruct the jury on an important part of a party's theory of the case. *Chambers v. Pierson*, 880 P.2d 1350, 1353-54 (Mont. 1994); *Smith v. Rorvik*, 751 P.2d 1053, 1058 (Mont. 1988).

Both St. Paul and Peterson offered proposed jury instructions on the issue of Gregoire's agency status. (CR 102; 123). Both parties raised the issue in pretrial motions. (CR 58; 59; 56; 57). The District Court neglected, however, to give any requested jury instructions at all. (CR 131). Consequently, the jury was free to conclude that St. Paul had no choice but to deny all liability because Gregoire "independently" advised that, although Peterson would not be found more than 50% negligent, Lindberg's liability was never reasonably clear. Moreover, the jury was never instructed, as requested

by Peterson, that Gregoire was St. Paul's agent and, therefore, St. Paul was responsible for Gregoire's admissions that Lindberg was 50% or more negligent for the accident. (Pl's Instr. 14, 37; TR Vol 946; 950-51).

The net effect of the District Court's complete failure to instruct on the agency issue was to focus all responsibility on Gregoire without any explanation that any of his actions, inactions, or admissions were legally attributable to St. Paul. The District Court committed reversible error by failing to instruct the jury on an important part of Peterson's theory of the case and Peterson is entitled to a new trial. *Schuff v. Jackson, supra*, at 394, ¶ 39.

CONCLUSION

The judgment in favor of St. Paul should be reversed and the case remanded to the District Court for a new trial.

DATED this 19th day of November, 2009.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 19th day of November, 2009, I mailed a true and correct copy of the above and foregoing through the United States Postal Service, postage prepaid, to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 11 for Windows, is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 19th day of November 2009.

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